LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
MAR 20 1956
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 489

DAN DURLEY,
PETITIONER,

vs.

NATHAN MAYO, Custodian,
Florida State Prison,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

RICHARD W. ERVIN
Attorney General
The Capitol
Tallahassee, Florida

REEVES BOWEN
Assistant Attorney General
The Capitol
Tallahassee, Florida

INDEX AND TABLE OF CASES

SUBJECT INDEX

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

TEXTBOOKS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 489

DAN DURLEY,
PETITIONER,

v.

NATHAN MAYO, Custodian,
Florida State Prison,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

JURISDICTION

This Court has no jurisdiction because, as will be more fully pointed out in our argument of Question One, post, there were two state grounds adequate to sustain the judgment of the Supreme Court of Florida and the decision of that Court might have been, and probably was, on one or both of said state grounds.

QUESTIONS PRESENTED

We state as follows the three questions presented:

QUESTION ONE

WHERE THE STATE SUPREME COURT JUDICIALLY KNEW THAT THE FEDERAL CLAIMS PRESENTED BY THE CURRENT PETITION FOR WRIT OF HABEAS CORPUS HAD BEEN PRESENTED AND/OR THAT THE PETITIONER HAD HAD A FAIR AND ADEQUATE OPPORTUNITY TO PRESENT THEM IN TWO PREVIOUS HABEAS CORPUS CASES, IN ONE OF WHICH THE PETITIONER DREW HIS OWN PETITION, WHICH WAS DENIED, AND IN THE OTHER OF WHICH THE PETITION WAS DRAWN BY COUNSEL AND THE WRIT WHICH WAS ISSUED WAS LATER QUASHED AFTER ARGUMENT, AND WHERE TWO ADEQUATE STATE GROUNDS EXISTED FOR DENYING THE CURRENT PETITION, VIZ., (1) UNDER THE STATE STATUTE AND THE RULINGS OF THE STATE SUPREME COURT HABEAS CORPUS DECISIONS ARE RES JUDICATA, AND (2) UNDER THE DECISIONS OF SAID COURT A PRISONER WILL NOT BE HEARD TO RAISE IN A SUBSEQUENT HABEAS CORPUS PROCEEDING ISSUES THAT HE HAD A FAIR AND ADEQUATE OPPORTUNITY TO RAISE AND HAVE DETERMINED IN AN EARLIER PROCEEDING, AND WHERE THE ORDER DENYING THE CURRENT PETITION DID NOT STATE THE GROUNDS UPON WHICH THE DENIAL WAS BASED BUT IT MIGHT HAVE BEEN, AND PROBABLY WAS, BASED ON ONE OR BOTH OF SAID ADEQUATE STATE GROUNDS, DOES THIS COURT HAVE JURISDICTION TO REVIEW SAID DENIAL?

QUESTION TWO

WHERE, UNDER THE STATE PRACTICE, IT IS PERMISSIBLE IN PROPER CASES TO CONVICT AN ACCUSED AND IMPOSE A SEPARATE SENTENCE UPON HIM FOR EACH OF TWO OR MORE OFFENSES CHARGED IN SEPARATE COUNTS OF ONE INFORMATION AND TO REQUIRE THAT SUCH SENTENCES BE SERVED CONSECUTIVELY, AND WHERE THE RECORD SHOWS THAT THE TRIAL COURT *ADJUDGED THE PETITIONER GUILTY OF THE OFFENSE CHARGED IN EACH OF TWO* THREE-COUNT INFORMATIONS AND IMPOSED A *SEPARATE SENTENCE FOR THE OFFENSE CHARGED IN THE FIRST COUNT* OF EACH INFORMATION; *FOR THE OFFENSE CHARGED IN THE SECOND COUNT* OF EACH INFORMATION, *AND FOR THE OFFENSE CHARGED IN THE THIRD COUNT* OF EACH INFORMATION, DOES THIS RECORD SHOW THAT THERE WERE SIX SEPARATE OFFENSES AND PRECLUDE THE CLAIM THAT THERE WERE ONLY TWO?

QUESTION THREE

WHERE IN HIS PETITION FOR HABEAS CORPUS THE PETITIONER MADE AN INSUBSTANTIAL AND INCONCLUSIVE SHOWING THAT HIS CONVICTIONS WERE BASED ON PERJURED TESTIMONY, AND WHERE THERE WAS NO CLAIM THAT THE STATE OR ANY OF ITS FUNCTIONARIES KNOWINGLY USED PERJURED TESTIMONY TO OBTAIN SUCH CONVICTIONS, DOES THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION ENTITLE THE PETITIONER TO A WRIT OF HABEAS CORPUS?

STATEMENT OF THE CASE

In 1945, a three-count information was filed against the petitioner in the Criminal Court of Record of Polk County, Florida (R. 9-10). Each count charged the larceny of cattle from the same owner on the same day.

Also, in 1945 another three-count information was filed against the petitioner in said court (R. 10-11). Each count charged the larceny of cattle from the same owner on the same day.

In one of these cases (No. 4179) the trial court adjudged the petitioner *guilty "of the offense charged in each count of the information in this cause"*, and sentenced him as follows (R. 13-14):

(1) Five years, "*for* your said *offense charged in the first count* of the information."

(2) Five years, "*for* your said *offense charged in the second count* of the information," "*to begin at the expiration of the sentence pronounced upon you for the offense charged in the first count of the information.*"

(3) Five years, "*for* your said *offense charged in the third count* of the information," "*to begin at the expiration of the sentence imposed upon you for the offense charged in the second count of the information.*"

In the other case (No. 4172) the trial court adjudged the petitioner "*guilty of the crime of stealing cattle as charged in each count of the information in this cause,*" and sentenced him as follows (R. 12-13):

(1) Five years, "*for* your said *offense charged in the first count* of the information," "to begin at

the expiration of the sentence pronounced upon you for the offense charged in the third count of the information in case No. 4179."

(2) Five years, "*for the offense charged in the second count* of the information in this cause," "*to begin at the expiration of the sentence imposed upon you for the offense charged in the first count of the information in this cause.*"

(3) Five years, "*for* the *offense charged in the third count* of the information in this cause," "*to begin at the expiration of the sentence imposed upon you for the offense charged in the second count of the information in this cause.*"

On May 9, 1949, the petitioner, not represented by counsel, filed in the Supreme Court of Florida his petition for writ of habeas corpus in which, among other things, he said: "Petitioner alleges that he * * * is falsely imprisoned by reason that *verdict of guilt was wholly supported by prejudge and perjured testimony.*" (R. 33.)

To said 1949 petition the petitioner attached the same affidavits of J. E. Croft (purporting to recount statements made to him by the petitioner's codefendant Charles Bath), R. B. Massey, Jr., (the other codefendant in the original prosecutions) and L. L. Bembry, (R. 35-37), which were attached to the 1955 petition for habeas corpus (R. 15-18), the denial of which is now before this Court for review.

The Supreme Court of Florida denied said 1949 petition on May 9, 1949. (R. 38).

On January 30, 1952, the petitioner, represented by counsel, filed in the Circuit Court of the Eighth Judicial Circuit in and for Union County, Florida, his petition

for writ of habeas corpus to which were attached as exhibits copies of the two informations and of the judgments and sentences above mentioned (R. 41). (The brief of counsel for the petitioner says that this petition was filed "with the aid of court-appointed counsel". We find nothing in the record to support the statement; anyway, the petitioner is not entitled to extract any advantage from the manner in which he acquired his 1952 attorney.) Said petition alleged in part as follows (R. 38-40):

"One

"That on or about the 19th day of October, A.D. 1945, your petitioner was convicted in the Criminal Court of Record, in and for Polk County, Florida, upon two Informations, each containing what purports to be three (3) separate counts, charging 'Stealing Cattle,' and sentenced therefore to a term of what purports to be five (5) years for each of said counts, in each of the said Informations, and aggregating into a thirty (30) year sentence. A copy of each of the said informations is attached hereto and made a part hereof, as is a copy of each of the said sentences, which are attached hereto and made a part hereof.

"Two

"That each of the said 'counts' in the aforesaid Informations [fol. 55] charge the one and same crime that is charged by the other 'counts' within the same Information; and each of the said 'counts' does merely separate the goods which were the subject of the larceny; and that the said 'counts' are not merely alternative or disjunctive, but do in fact charge the one and same crime.

"Three

"That the third 'count' in the Information in case No. 4179 does repeat and reiterate verbatim that

which is set out in the second 'count' therein; and that both of the aforesaid 'counts' do but repeat that same thing that is set out in the first 'count' therein, and with specificity.

"Four

"That the maximum penalty, by way of imprisonment, for the crime of 'Stealing Cattle' is five (5) years imprisonment in the State Prison.

"Five

"That the two Informations aforesaid, do make out but two crimes of 'Cattle Stealing,' and that the maximum sentence which could be meted out therefor is two five (5) year sentences to the State Prison; and that the sentences could be made consecutive, thereby making a maximum imprisonment therefor a period of ten (10) years.

"Six

"That your petitioner has already served, by virtue of the sentences resulting from the aforesaid Informations, in the State Prison, a term of years, which combined with accrued gain time, is greater than the time necessary to satisfy a ten-year sentence in the State Prison.

"Seven

"That there are no other sentences outstanding by virtue [fol. 56] of which your petitioner could at this time be imprisoned and detained.

"*Therefore, petitioner* would show unto the Court that he *is detained* and *imprisoned by the respondent herein*, against his will and *in direct violation of his rights as set out in the Constitution of the United States*, and the Constitution of the State of Florida, and contrary to the laws of the State of Florida." (Emphasis supplied.)

On January 31, 1952, upon the basis of said petition, the said Circuit Court issued its writ of habeas corpus, directed to the respondent in said cause, who is also the respondent in the case at bar (R. 41-42).

On February 7, 1952, the respondent filed his return to said writ of habeas corpus, in which return he alleged in part as follows (R. 43-44):

"2

"He denies the allegations of paragraph Two of the petition herein, and each of them severally. He denies that any count of either of said informations charges the same larceny as is charged in the other counts of the same information, or either of them. He denies that the larceny charged any count of either of said informations was committed at the same time and place and under the same circumstances as the larceny charged in the other counts of the same information, or either of them.

"3

"He admits that counts 2 and 3 of the information in case #4179 (which information charged the larceny of animals belonging to William C. Zipperer) are couched in similar verbiage, but he denies that the larceny of heifer charged in the third count is the same larceny as the larceny of [fol. 68] heifer charged in the second count. He denies the petitioner's allegations that the second and third counts 'do but repeat that same thing that is set out in the first "count" therein, and with specificity.'

"4

"He admits the allegations of paragraph Four of the petition.

"5

"He denies that the said two informations made out only two crimes of cattle stealing, and he says

that each count of each of said informations charged a separate, distinct larceny of cattle. He denies that the maximum sentence which could be meted out under each information was five years, and says that it was lawful to impose a five-year sentence under each count of each information, and to prescribe that they run consecutively.

"6

"He admits the allegations of paragraphs Six and Seven of the petition.

"7

under and by virtue of said sentences, but he denies that said custody is unlawful."

"He admits that he holds the petitioner in custody

On February 7, 1952, the said Circuit Court entered its order quashing said writ and remanding the petitioner to the custody of the respondent, which order recited that the cause came on to be heard upon a writ of habeas corpus and respondent's return thereto and that argument for the respective parties had been heard (R. 42).

The petitioner appealed from said Circuit Court order to the Supreme Court of Florida (R. 44-45) and his appeal was dismissed by said Supreme Court upon the motion of counsel for the appellee (R. 45).

On February 10, 1955, the petitioner filed in the Supreme Court of Florida a petition for writ of habeas corpus, the denial of which is now under review, to which petition were attached copies of the above mentioned informations, judgments and sentences, and affidavits, and also a copy of an affidavit made by Jack K. Rouse and Duaine A. Rouse (R. 1-18). In said petition he claimed that only two offenses were involved instead of six, that he had served enough time to complete sen-

tences for two of the offenses, and that he was being subjected to triple punishment for each offense; also, that his convictions were based solely on perjured testimony. He alleged that his imprisonment was an abuse of the due process clause of the 14th Amendment to the Constitution of the United States of America.

On February 22, 1955, said petition was denied without opinion. The order of denial recited that "the Petitioner has failed to show as a condition precedent probable cause to believe that he is detained in custody without lawful authority" (R. 20).

The brief filed in this Court by counsel for the petitioner (P. 9) states that "petitioner is nevertheless prepared to show that Judge Murphree (who was the judge who presided over the above mentioned 1952 habeas corpus case) * * * was persuaded by the argument of the respondent's counsel that the prior dismissal of petitioner's previous petition for writ of habeas corpus by the Florida Supreme Court on May 9, 1949, had settled petitioner's contentions adversely to him and barred their assertion in the Circuit Court (see pp. 1-2 of petitioner's brief in reply to respondent's brief in opposition to petition for certiorari filed with this Court September 6, 1955)". (Parenthetical matter supplied.)

We answer that (1) this allegation is not based upon the facts; (2) even if the allegation were true, it would not affect the fact that Judge Murphree's order quashing the writ of habeas corpus and remanding the petitioner to custody is res judicata under Florida law; and (3) even if said allegation were true, it was not before the Supreme Court of Florida in the petition which is now here for review and this Court should not weigh the ruling of that Court upon the basis of a matter which was not before it for consideration.

SUMMARY OF ARGUMENT

ONE

This Court has no jurisdiction where the decision of the state court might have been based on an adequate state ground.

The state court judicially knew that the petitioner's 1949 and 1952 petitions for habeas corpus sufficiently raised the federal questions presented by the 1955 petition, and the state rule of res judicata prevented further consideration of those claims and was an adequate state ground for denying the 1955 petition. The order denying the 1955 petition did not state the ground upon which the denial was based and it might have been, and probably was, based upon said adequate state ground.

There was another adequate state ground upon which the denial of the 1955 petition might have been, and probably was, based, viz., the state court judicially knew that the petitioner had had a fair and adequate opportunity to present in his 1949 and 1952 petitions, and to have determined, the federal questions raised in his 1955 petition and therefore under the state rule he could not be heard to raise those questions in his 1955 petition.

TWO

The records of the trial court, which were judicially known to the Supreme Court of Florida, show that the petitioner was convicted and sentenced for six separate offenses, and those records cannot be contradicted.

Even if this were not so, the erroneous imposition of two sentences for a single offense is not double jeopardy.

There is no merit in the petitioner's contention that the imposition upon him of sentences totaling 30 years constituted cruel and unusual punishment of the type forbidden by the 8th Amendment and that the due process clause of the 14th Amendment applies the 8th Amendment's cruel and unusual punishment clause to state action.

There is likewise no merit in the petitioner's contention that the equal protection clause of the 14th Amendment has been violated and that by violating said clause the Florida courts have violated the due process clause of said amendment.

THREE

The due process clause of the 14th Amendment does not apply to any action except state action. It does not apply where, as here, the alleged perjured testimony was not knowingly used by the state or any of its officers or agents. Moreover, even if the reverse were true, the petitioner's showing that perjured testimony was used was too insubstantial and inconclusive to require the issuance of a writ of habeas corpus.

ARGUMENT

ONE

THE DECISION OF THE STATE COURT IN DENYING THE PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS MIGHT HAVE BEEN, AND PROBABLY WAS, BASED UPON STATE GROUNDS ADEQUATE TO SUSTAIN THE DECISION.

As this Court said in *Williams v. Kaiser, 323 U. S. 471, 477:*

"And where the decision of the state court *might* have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. Klinger v. Missouri, 13 Wall. (US) 257, 263, 20 L ed 635, 637; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 US 293, 297, 35 L ed 193, 195, 11 S Ct 528; Allen v. Arguimbau, 198 US 149, 154, 155, 49 L ed 990, 993, 25 S Ct 622; Lynch v. New York, 293 US 52, 79 L ed 191, 55 S Ct 16, supra." (Emphasis supplied.)

The same sort of pronouncement was made in *Stembridge v. Georgia, 343 U. S. 541, 547,* in which case this Court also said:

"Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. Hedgebeth v. North Carolina, 334 US 806, 92 L ed 1739, 68 S Ct 1185; Woods v. Nierstheimer, 328 US 211, 90 L ed 1177, 66 S Ct 996; White v. Ragen, 324 US 760, 89 L ed 1348, 65 S Ct 978; McGoldrick v. Gulf Oil Corp., 309 US 2, 84 L ed 537, 60 S Ct 375; Woolsey v. Best, 299 US 1, 81 L ed 3, 57 S Ct 2; Lynch v. New York, 293 US 52, 79 L ed 191, 55 S Ct 16; Cuyahoga River Power Co. v. Northern Realty Co., 244 US 300, 303, 304, 61 L ed 1153, 1157, 1158, 37 S Ct 643; Adams v. Russell, 229 US 353, 358-362, 57 L ed 1224, 1226-1228, 33 S Ct 846; Allen v. Arguimbau, 198 US 149, 154, 155, 49 L ed 990, 993, 25 S Ct 622; Johnson v. Risk, 137 US 300, 307, 34 L ed 683, 686, 11 S Ct 111; Klinger v. Missouri (US), 13 Wall 257, 263, 20 L ed 635, 637."

The decision of the Supreme Court of Florida denying the petitioner's current petition for writ of habeas

corpus might have been, and probably was, based upon one or both of the following adequate state grounds:

(A) Under the Florida statute and the decisions of the Supreme Court of Florida the federal claims made in said petition were res judicata because of the denial of previous petitions for habeas corpus raising the same questions.

(B) The petitioner having previously sought habeas corpus, his current petition comes under the rulings of the Supreme Court of Florida that a convicted prisoner will not be heard to raise in a subsequent proceeding, whatever its nature, issues that the prisoner had had a fair and adequate opportunity to raise and have determined in earlier proceedings.

AS TO THE CLAIM OF DOUBLE JEOPARDY OR DOUBLE PUNISHMENT.

The Supreme Court of Florida takes judicial notice of its records (*Irvin v. Chapman, 75 So. 2d 591, 592; Baker v. State, 150 Fla. 446, 7 So. 2d 792*) and those records, which are in the record now before this Court, show that the petitioner's federal claim as to double jeopardy or double punishment had previously been adjudicated in a habeas corpus proceeding brought by the petitioner.

And under the Florida statute and the holdings of the Supreme Court of Florida, decisions in habeas corpus cases are res judicata (*Section 79.10, Florida Statutes*, formerly Section 5443, Compiled General Laws; *D'Alessandro v. Tippins, 102 Fla. 10, 137 So. 231; State ex rel. Davis v. Hardie, 108 Fla. 133, 146 So. 97; State ex rel. Williams v. Prescott, 110 Fla. 261, 148 So. 533;* and *Moat v. Mayo, 82 So. 2d 591*).

The petitioner's claim is, and he made the same claim in his 1952 petition, that he could not lawfully be required to serve more than 5 years under the sentences imposed in each case, or a total of 10 years. In his said 1952 petition to the Circuit Court of the Eighth Judicial Circuit of Florida in and for Union County, he alleged that the time he had already served, plus the gain time earned, was greater than the time required to serve a 10-year sentence, and he distinctly raised the federal question of whether the United States Constitution entitled him to escape serving more than 5 years under the sentences in each case. (R. 38-40.) The respondent's return admitted that the petitioner had served enough time and earned enough gain time to make a 10-year sentence. (R. 44.)

In said 1952 petition it was alleged (R. 40):

> "*Therefore, petitioner* would show unto the Court that he *is detained and imprisoned by the respondent herein,* against his will and *in direct violation of his rights as set out in the Constitution of the United States,* and the Constitution of the State of Florida, and contrary to the laws of the state of Florida." (Emphasis supplied.)

This allegation, coupled with the other allegations claiming double jeopardy or double punishment, was sufficient to properly present a federal question to the Circuit Court, that is to say, the question of whether the petitioner was imprisoned in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

We concede that, as stated in *Wolfson & Kurland, Jurisdiction of the Supreme Court of the United States, 149 et seq.* (cited with approval by this Court in *Braniff Airways v. Nebraska State Board, 347 U.S. 590, 599*):

"Considerable confusion exists in the decisions of the Supreme Court with respect to the definiteness and particularity required to raise a federal question.

* * *

"Many of the holdings of the Supreme Court, because of the two lines of doctrine, are inconsistent."

However, we submit that the modern decisions of this Court sustain the sufficiency of said 1952 petition for habeas corpus to raise the federal question here presented as to double jeopardy or double punishment.

As far back as *Oxley Stave Company v. Butler County, 166 U.S. 648, 657,* this Court recognized that there is no rigid rule requiring a litigant to put his finger on the particular section or the precise words of the constitution upon which he relies. We quote from the opinion in that case as follows:

"If there has been any modification of the views expressed in the two cases just cited, it has been only in the particular that it is not always necessary to refer to the precise words or to the particular section of the Constitution, under which some right, title, privilege or immunity is claimed, and that it is sufficient if it appears affirmatively from the record that a right, title, privilege or immunity is specially set up or claimed under that instrument or under the authority of the United States."

And in the recent case of *Braniff Airways v. Nebraska State Board, supra,* reliance was placed upon the Commerce Clause and there was no specific claim of protection under the due process clause of the 14th Amendment. Nevertheless, this Court treated as sufficiently presented the federal question of whether the due process clause had been violated. We quote from this Court's opinion in that case (*347 U.S., text 598, 599*):

"*In relying upon the Commerce Clause on this issue and in not specifically claiming protection under the Due Process Clause of the Fourteenth Amendment, appellant names the wrong constitutional clause to support its position.* While the question of whether a commodity en route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process. *However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented.* See New York ex rel. Bryant v. Zimmerman, 278 US 63, 67, 73 L ed 184, 187, 49 S Ct 61, 62 ALR 785, and cases cited; Wolfson & Kurland, Jurisdiction of the Supreme Court of the United States, 149 et seq." (Emphasis supplied.)

Also, in the recent case of *Gibbs v. Burke, 337 U. S. 773* (decided in 1948, long before the petitioner in the case at bar filed his 1952 petition for habeas corpus), the petition for habeas corpus alleged that the petitioner "was denied his constitutional Rights as set forth in the Ten Original Amendments, Article VI." Nevertheless, on writ of certiorari to the Supreme Court of Pennsylvania, this Court reversed a judgment denying a writ of habeas corpus and held that the petition was sufficient to raise the question of whether the 14th Amendment had been violated. This Court said (text 779):

"The federal question was adequately if inartistically raised in the petition for a writ of habeas corpus. We consider insignificant under these circumstances the fact that petitioner cited the Sixth rather

than the Fourteenth Amendment to the Constitution. Meticulous insistence upon regularity in procedural allegations is foreign to the purpose of habeas corpus."

We grant that in *Gibbs v. Burke* the petitioner was apparently not represented by counsel when he filed his habeas corpus petition and that in the case at bar the petitioner was represented by counsel when he filed his 1952 petition. However, that should not prevent the rule of *Gibbs v. Burke* from applying to the instant case because, as was said by this Court in *Gibbs v. Burke*, in holding that a federal due process question was raised even though the petition mentioned neither due process nor the 14th Amendment nor the U. S. Constitution:

"Meticulous insistence upon regularity in procedural allegations is foreign to the purpose of habeas corpus."

Although in the 1952 petition for habeas corpus the petitioner alleged in general terms that he was imprisoned in direct violation of his rights as set out in the Constitution of the United States, it is clear now, and it must have been clear to the Circuit Court and to the Supreme Court of Florida, that the only provision of the United States Constitution which could even have been thought by anyone to be applicable to the allegations of fact set forth in said petition was the 14th Amendment. Therefore the clear intendment of said petition was that the petitioner was raising a federal question under the 14th Amendment and we submit that said 1952 petition sufficiently raised the same federal due process question as to double jeopardy which is presented by the current petition now under consideration.

Therefore, a writ of habeas corpus having been issued

as prayed in said 1952 petition, and said writ having been quashed and the petitioner remanded to custody at a hearing held by the Circuit Court, and the Supreme Court of Florida having dismissed the petitioner's appeal from the Circuit Court's ruling, the said ruling is res judicata as to said federal question under the above cited Florida statute and Florida decisions.

But even if the federal question now asserted had not been sufficiently raised in said 1952 habeas corpus proceedings, there is another adequate state ground to sustain the Supreme Court of Florida's denial of the petition here under consideration, that is to say, the federal claim raised by the current petition as to double jeopardy or double punishment was waived and could not be heard because of the fact that, as said Court judicially knew from its own records, the petitioner had had a fair and adequate opportunity to raise and have such question determined in the earlier 1952 habeas corpus proceedings in which he was represented by counsel.

In *State ex rel. Johnson v. Mayo, 69 So. 2d 307, 309*, the Supreme Court of Florida said:

> "In the petition for the writ of habeas corpus the petitioner has not made any attempt to give a reason for his failure to raise in prior proceedings the grounds now asserted for the first time in his petition for habeas corpus. Therefore, it must be held, under the decisions, that he has waived or forfeited the right to raise the issue by his failure to make timely assertion thereof."

Even if this Court should hold that the federal question as to double jeopardy or double punishment was not adequately presented by the 1952 petition for habeas corpus, it is to be noted that in the current petition the petitioner made no attempt to give a reason for his failure

to raise such federal question in the 1952 proceeding. Indeed, he could hardly have given a sufficient reason because he was represented by counsel in 1952, he knew all of the pertinent facts in 1952 which he knew in 1955, and he pled substantially the same facts in both petitions. Consequently, if this Court should hold that the 1952 petition did not adequately raise the federal question, then the rule of state procedure laid down in the foregoing quotation from *State ex rel. Johnson v. Mayo* was an adequate state ground to sustain the judgment of the Supreme Court of Florida in the case at bar.

And in *Washington v. Mayo*, 77 So. 2d 620, 621, the Supreme Court of Florida said:

> "The rule is clear that a *convicted prisoner should not be heard to raise in a subsequent proceeding, whatever its nature, issues* that were previously raised and determined, or *that the prisoner had a fair and adequate opportunity to raise and have determined in earlier proceedings.*" (Emphasis supplied.)

and we point out that it is clear that the petitioner had a fair and adequate opportunity to raise and have said federal question determined in said 1952 proceeding, since he was represented by counsel throughout that proceeding and then knew all pertinent facts which he knew when he filed the current petition in 1955.

The petitioner contends that the decision below did not rest upon the defense of res judicata because that defense was not affirmatively pleaded by the respondent. He cites *Rule 1.8, Florida Rules of Civil Procedure, 30 F. S. A., 1954 Supplement, page 64*, as authority for his claim that it is necessary to plead res judicata. It is only necessary to refer to *Rule "A," Florida Rules of*

Civil Procedure, found on *page 53* of the same *Supplement*, to see that said *Rule 1.8* has no reference to cases in the Supreme Court of Florida, whose order denied the current petition. The petitioner cites *Taylor v. Chapman, 127 Fla. 401, 173 So. 143, 144*; in support of his claim, but the ruling there had to do with a circuit court habeas corpus case and is not applicable to habeas corpus cases instituted in the Supreme Court of Florida, which, as above noted, takes judicial notice of its own records, and which frequently denies petitions for habeas corpus because those records show that the claims made by said petitions are res judicata and/or because its records show that the petitioners have had a fair and adequate opportunity to raise and have determined in prior proceedings the questions presented.

In an effort to show that the Supreme Court of Florida did not rely upon the doctrine of res judicata, the petitioner cites *Universal Const. Co. v. City of Fort Lauderdale (Fla.), 68 So. 2d 366, 369*, to the effect that the courts are more interested in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation. Whatever may have been said in that case does not detract from the fact that the Supreme Court of Florida frequently does apply the doctrine of res judicata in habeas corpus cases, as witness the above cited decisions of the Supreme Court of Florida so applying said doctrine, dating both before and after the 1953 decision in *Universal Const. Co. v. City of Ft. Lauderdale*.

The fact also remains that in *State ex rel. Johnson v. Mayo, supra*, (decided in 1954, after the 1953 decision in the case relied on by the petitioner), the Supreme Court of Florida held that where a petition for a writ of habeas corpus did not make any attempt to give a

reason for not having raised the grounds for the petition in prior proceedings, the petitioner waives the right to raise the issue by his failure to make timely assertion thereof; and that in *Washington v. Mayo, supra,* (also decided after the case relied upon by the petitioner), the Supreme Court of Florida said that a convicted prisoner should not be heard to raise in a subsequent proceeding, whatever its nature, issues that the prisoner had had a fair and adequate opportunity to raise and have determined in earlier proceedings.

The petitioner contends that the order of the Supreme Court of Florida shows on its face that that Court considered the current petition on its merits and necessarily ruled on the federal claims asserted therein. Not so at all. The contention is based upon the fact that said Court's order denying the current petition recited that "it appears that the Petitioner has failed to show as a condition precedent to the writ of Habeas Corpus, probable cause to believe that he is detained in Custody without lawful authority" (R. 20). This recital by no means excludes the idea that the order was predicated upon one of the adequate state grounds hereinabove discussed.

Bearing in mind that the Supreme Court of Florida takes judicial notice of its own records and judicially knew all about the 1952 habeas corpus proceedings, the said recital does not exclude one or both of the above mentioned adequate state grounds from being the basis for the ruling in the case at bar. If the ruling was based upon the doctrine of res judicata, made to appear from the 1952 proceedings, then it was literally and figuratively true that the petitioner had failed to show as a condition precedent to the writ, probable cause to believe that he was detained in custody without lawful authority.

This is so because, with the bar of res judicata being judicially known to the Court, the petitioner failed, as a matter of state law, to show that he was being detained without lawful authority. If, on the other hand, the Supreme Court of Florida believed that he had not presented his said federal ground in the 1952 habeas corpus proceeding clearly enough to cause the ruling in that proceeding to be res judicata under Florida law, said Court still judicially knew that he was not being illegally detained because the said federal claim was no longer cognizable under Florida law on account of the fact that, being represented by counsel in the 1952 proceeding, he had had a fair and adequate opportunity to raise the claim in that proceeding and made no effort to give a satisfactory reason for not having done so.

The order now under review is in the standard form used by the Supreme Court of Florida in all habeas corpus actions for a good many years, and said form has uniformly been used when denying habeas corpus petitions regardless of what reasons were advanced by the respondents before said Court for denying the petitions. In other words, said form of order has consistently been used for years in cases where the respondents contended that the petitions were insufficient on their face to show an unlawful detention, and when the respondents contended that the petitioners' claims were barred by the state doctrine of res judicata because of previous habeas corpus proceedings in said Supreme Court, and when the respondents contended that the petitions should be denied because the petitioners had had a fair and adequate opportunity to present their claims in former proceedings, whether habeas corpus or not, judicially known to said Supreme Court.

Since the general terms of the said order do not show

the ground or grounds upon which it was based, and since its terms do not exclude the possibility that it was based upon one of the adequate state grounds urged by the respondent herein, it might be, and probably is, a fact that the order was predicated upon one or both of said state grounds.

AS TO THE CLAIM THAT THE PETITIONER'S CONVICTION WAS BASED UPON PERJURED TESTIMONY.

On May 9, 1949, the petitioner filed in the Supreme Court of Florida a petition for writ of habeas corpus in which he alleged (R. 33):

> "Petitioner alleges that he is innocent of said offense and is falsely imprisoned by reason that *verdict of guilt was wholly supported by prejudge and perjured testimony.*"

The said petition did not mention the Constitution of the United States or any provision thereof. Nor did the petition in *Gibbs v. Burke, supra,* mention the Constitution of the United States or the 14th Amendment and, even if the allegations of Gibbs' petition should be thought to impliedly refer to the Constitution of the United States, the provisions thereof upon which he relied were inapplicable to his situation. As was the case with Gibbs, the petitioner here was not represented by counsel when he filed his 1949 petition. Therefore, we submit that the said 1949 petition was just as sufficient to raise a federal due process question as was the petition in *Gibbs v. Burke.*

Moreover, the said 1949 petition was as adequate to raise a federal question as were the pleadings in *Braniff Airways v. Nebraska State Board, supra,* because in the

latter case reference was made to the wrong provision of the United States Constitution.

The result is that under the above cited authorities the denial of the 1949 petition was res judicata under Florida law and the Supreme Court of Florida might have denied, and probably did deny, the current petition because of res judicata judicially known to said Court.

However, even if the Supreme Court of Florida had deemed said 1949 petition insufficient to raise a federal question, the fact remains that the said court judicially knew that the petitioner, represented by counsel, had had a fair and adequate opportunity to raise his federal question about perjured testimony in his said 1952 petition but did not do so and did not even mention perjured testimony. Said Court also knew that his current petition did not undertake to give any reason for not having raised his present federal question as to perjured testimony in said 1952 proceedings; indeed, it is hard to see how he could have given a good reason because he was represented by counsel in 1952. The result is that, even if said Court deemed the state doctrine of res judicata inapplicable, the petitioner was not entitled to be heard under the decisions of said Court in *State ex rel. Johnson v. Mayo, supra,* and *Washington v. Mayo, supra,* on the claim in his current petition that his federal constitutional rights were violated by the use of perjured testimony at his trial. This was another adequate state ground upon which the decision of the Supreme Court of Florida might have been and probably was based.

TWO

THE STATE OF FLORIDA HAS NOT CONVICTED AND PUNISHED THE PETITIONER MORE THAN

ONE TIME FOR A SINGLE OFFENSE AND THE SENTENCES IMPOSED BY THE STATE COURT HAVE NOT VIOLATED HIS RIGHTS AND IMMUNITIES UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The allegations of the petition for habeas corpus as to double jeopardy or double punishment cannot be accepted as true because those allegations conflict with the records of the trial court, which were before the Supreme Court of Florida at the time it made its ruling in the case at bar.

In Case No. 4179, the petitioner was adjudged guilty *"of the offense charged in each count of the information,"* and was sentenced to serve five years *"for your said offense charged in the first count,"* five years *"for your said offense charged in the second count,"* and five years *"for your said offense charged in the third count,"* with said sentences to run consecutively. (R. 13-14.)

In Case No. 4172, the petitioner was adjudged *"guilty of the crime of stealing cattle as charged in each count of the information in this case,"* and was sentenced to serve five years *"for your said offense charged in the first count,"* five years *"for the offense charged in the second count,"* and five years *"for the offense charged in the third count,"* with said sentences to run consecutively to each other and consecutively to the sentences in Case No. 4179 (R. 12-13).

It thus appears from the records of the sentencing court, which were before the Supreme Court of Florida, that the sentencing court adjudged the petitioner guilty of six separate larcenies and sentenced him for six separate larcenies, because in each of the two cases the

court adjudged the appellant guilty of *the CRIME CHARGED IN EACH COUNT;* and in each case the court sentenced the appellant for (1) *THE OFFENSE CHARGED IN THE FIRST COUNT,* (2) *THE OFFENSE CHARGED IN THE SECOND COUNT,* and (3) *THE OFFENSE CHARGED IN THE THIRD COUNT.*

And we point out that court records impart absolute verity as to all matters covered by them, and that they cannot be collaterally impeached in habeas corpus proceedings.

It is permissible, under proper circumstances, to charge in separate counts of one information four distinct crimes of receiving stolen goods *(Stovall v. State, 156 Fla. 832, 24 So. 2d 582).* The logic and reasoning behind the decision in the Stovall case applies with equal force to a larceny case and permits, under proper circumstances, the charging of several distinct larcenies in different counts of the same information.

By adjudging the petitioner in the case at bar to be guilty of six separate larcenies, and by sentencing him for each of six separate larcenies, the trial court held that there actually were six separate larcenies and that the circumstances were such as to make it permissible to charge three of them in one information and the other three in a second information.

The fact that the information in case 4179 showed that all of the larcenies therein charged were committed on the same date and from the same cattle owner, and that the same situation obtained in case 4172 does not overcome the trial court's adjudication that there were six separate larcenies, since the Supreme Court of Florida has ruled " . . . that where property is stolen from

the same owner . . . at different times or places or as a result of a series of acts, separated in either time, place or circumstances, one from the other, each taking is a separate and distinct offense has been established as the law of this state since the case of Green v. State, 134 Fla. 216, 183 So. 728" *(Hearn v. State, 55 So. 2d 559)*, and it is undoubtedly possible for several larcenies to be committed from the same property owner at different times and places, and under different circumstances during the same day.

It thus appears that as a matter of fact and law, established by the trial court's judgments and sentences, there has been no double jeopardy or double punishment for the same offense, and that therefore the Supreme Court of Florida was justified in rejecting the petitioner's contention on this score.

And even if the record did not refute the petitioner's contention that he has been punished more than one time for the same offense, it appears that in *Holiday v. Johnston, 313 U. S. 342, 349*, this Court specifically ruled that "The erroneous imposition of two sentences for a single offense of which the accused has been convicted, or as to which he has pleaded guilty, does not constitute double jeopardy," and we point out that in that case the question was as to whether the imposition of two sentences for a single offense offended the 5th Amendment's double jeopardy clause and that, since this Court ruled that it did not so offend, it follows that two sentences imposed by a state court for a single offense certainly do not constitute double jeopardy in violation of the 14th Amendment.

The petitioner contends that the sentences totaling 30 years which were imposed upon him constitute cruel

and unusual punishment of the type forbidden by the 8th Amendment and that the due process clause of the 14th Amendment applies the 8th Amendment's cruel and unusual punishment clause to state action. In *Louisiana v. Resweber, 329 U. S. 459, 464,* this Court said that "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, * * * ." There is no cruelty in the method of punishing the petitioner; he is merely confined in the state prison to serve his sentences just as any other prisoner sentenced to confinement in that institution. Moreover, the duration of the petitioner's sentences does not cause them to be cruel and unusual; it cannot rightly be said that a 5-year sentence for each of 6 separate acts of larceny of cattle is so cruel and unusual as to be within the meaning of the 8th Amendment's provision against cruel and unusual punishment. Said sentences are certainly not greater than has before been prescribed, known and inflicted as punishment. Moreover, so far as we have been able to ascertain, this Court has never held that violation of the principles of the 8th Amendment against cruel and unusual punishment violates the due process clause of the 14th Amendment. The nearest thing to a ruling on the question which we find is *Louisiana v. Resweber, supra,* where this Court examined the circumstances under the assumption, but without so deciding, that such cruel and unusual punishment would violate the due process clause of the 14th Amendment.

The petitioner contends that the equal protection of the laws clause of the 14th Amendment has been violated and that by violating said equal protection of the laws clause the Florida courts have violated the due process clause. In the first place, as we have hereinabove pointed out, the records show that there were six sep-

arate offenses and the result is that the petitioner has not received a different and higher punishment than is imposable and imposed on others for like offenses. Even if this were not so, the equal protection of the laws clause sits on its own bottom and is not sucked into and absorbed by the due process clause as a part thereof, regardless of what the facts might be. Also, we submit that the cases cited by the petitioner in support of his claim in this regard do not support the claim.

THREE

THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT DOES NOT REQUIRE THAT A STATE FURNISH A REMEDY TO AN ACCUSED WHO HAS BEEN CONVICTED ON THE BASIS OF PERJURED TESTIMONY, WHERE THERE IS NO HINT THAT THE STATE OR ANYONE IN ITS BEHALF INSTIGATED, HAD ANYTHING TO DO WITH OR KNEW ANYTHING ABOUT THE PERJURY.

The due process clause of the 14th Amendment provides:

> "nor shall any *state* deprive any person of life, liberty or property, without due process of law." (Emphasis supplied.)

In *Virginia v. Rives, 100 U. S. 313, 317-318*, this Court, after quoting, inter alia, the due process clause of the 14th Amendment, said:

> "The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals."

In the *Civil Rights Cases, 109 U. S. 3, 10-11*, this Court,

after quoting the first section of the 14th Amendment, which includes the due process clause, said:

> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."

There is no claim in this case that the state, through any official or agent or representative, knowingly used perjured testimony at the trial of the petitioner. Therefore, when the foregoing principles of law, which are undoubtedly sound, are applied to the case at bar, the inexorable result is that the petitioner has asserted nothing which, if true, would indicate a violation of the due process clause of the 14th Amendment. If there was perjury it was the act of individual witnesses and not the act of the State of Florida. No action is state action which is not instigated, encouraged or put into motion by the state or its functionary. Here the only action alleged by the petitioner was the action of two individual state witnesses in giving perjured testimony against the petitioner, with no allegation as to any state action whatsoever.

Certain cases decided by this Court (for example, *Mooney v. Holohan, 294 U. S. 103*) have held that where the state through one of its officials knowingly uses perjured testimony which results in the conviction of a defendant in a state court, such knowing use of perjured testimony violates the accused's federal constitutional rights. The basis of these decisions is that the perjury is state action because knowingly used by a state official or agent. We have found no case decided by this Court which even intimated that anything short of the knowing use of perjured testimony by the state would amount to a violation of the due process clause of the 14th Amendment.

However, we do find that in *Hysler v. Florida, 315 U. S. 411, 413*, where Hysler claimed that his conviction should be set aside because obtained upon the perjured testimony of two state witnesses one of whom had signed a recanting affidavit, this Court said:

> "In this collateral attack upon the judgment of conviction, the petitioner bases his claim on the recantation of one of the witnesses against him. *He cannot, of course, contend that mere recantation of testimony is in itself ground for invoking the Due Process Clause* against a conviction. However, if Florida through her responsible officials *knowingly* used false testimony which was extorted from a witness 'by violence and torture,' one convicted may claim the protection of the Due Process Clause against a conviction based upon such testimony." (Emphasis supplied.)

and we point out that the petitioner in the case at bar has not even attempted to go further than to claim that two state witnesses had recanted after giving perjured testimony against him.

Where state officers make an unlawful search and seizure, the evidence obtained thereby is admissible in the federal courts when not participated or cooperated in by federal officials or agents. *(Weeks v. U. S., 232 U. S. 383; Annotations, 134 A. L. R. 827; 150 A. L. R. 576.)* In such situations the United States Government is permitted to enjoy the fruits of the unlawful search and seizure by putting the state officers on the stand and having them testify to what they found and seized and by putting in evidence the articles seized. The reason this is legally possible is that the acts of the state officers are not federal action. How, then, can it rightly be thought that the acts of witnesses for the state in committing perjury all unbeknownst to the judge, the

prosecuting attorney, the jurors and all the other state functionaries amounts to state action? It can't, we submit.

We deduce from the petitioner's statement of Question 3 that he thinks that the "state's *continued* imprisonment" of the petitioner violates the due process clause even if his original convictions by the unwitting use of perjured testimony did not violate due process. Such a theory is untenable because, since the original convictions cannot be struck down as violative of the due process clause, those convictions and the sentences which followed furnish an unassailable basis for the continued imprisonment of the petitioner.

Moreover, even if the due process clause of the 14th Amendment prohibited a conviction where a state witness perjured himself without the knowledge of the state or any of its officers (we submit that it doesn't), the petitioner's claim that he was convicted solely upon the basis of perjured testimony is so insubstantial and inconclusive as to justify its rejection without a hearing on the merits thereof.

Here only one of the principal witnesses against the petitioner, R. B. Massey, Jr., has ever shown a willingness to put his name on the dotted line in support of his repudiation of his trial testimony. He did that in March, 1946, approximately 10 years ago (R. 16-17). There is not the slightest showing in the petition for writ of habeas corpus as to whether Massey is at this late time willing to back up his 1946 affidavit by getting on the witness stand and testifying to the same effect. For that matter, for all that the petition shows, Massey may be dead or otherwise completely unavailable to give testimony even if it were to be assumed that otherwise he would now be willing to do so.

As to the witness Charlie Bath, it does not appear that he has ever made a recanting affidavit or written statement of any kind. The most that the petition shows as to him is that in May, 1947, nearly nine years ago, one J. E. Croft made an affidavit to the effect that in January, 1946, Bath had orally made recanting statements to Croft (R. 17-18). But that does not mean that he would now testify to the same effect even if he should be alive and available as a witness, as to which the petition for writ of habeas corpus is silent. Actually there is grave doubt that Bath would give recanting testimony because according to Croft's said affidavit Bath stated back in 1946 that "if there was any way that he could help Durley, *without hurting himself* he would be glad to do so" (R. 18) and we observe that Bath could hardly help Durley without making himself out to be a perjurer and gravely hurting himself.

As to L. L. Bembry's affidavit, (R. 15) it established nothing of value to the petitioner. The most that it showed in his favor was that on Saturday, July 7, 1945 (the day the cattle involved in one case were alleged by the information to have been stolen) the petitioner worked with Bembry until noon. That falls far short of even tending to establish the petitioner's innocence of the theft of the cattle which were stolen on that day. For all that it shows, the cattle could easily have been stolen in the early morning hours of that day before work time or during the afternoon or night of that day. Nor does Bembry's affidavit make any showing whatever as to July 29, 1945, the day the cattle involved in the other case were alleged to have been stolen.

For all that is shown by the petitioner, he has had the above mentioned affidavits in his possession and available to him ever since they were made long years ago

and it is certain that he has had them available to him since 1949 when he attached copies thereof to the petition for writ of habeas corpus which he filed in the Supreme Court of Florida (R. 33-37).

So it is that such evidence of perjury as the petitioner has is far from being newly discovered evidence and is so insubstantial and inconclusive as to wholly fail to show that the petitioner's convictions were based on perjured testimony. This is especially true when it is considered that there was an utter failure to show that Charlie Bath (upon whose testimony the petitioner's convictions rested in part) has ever signed a recanting document or has ever been willing or is now willing and able to take the stand and repudiate under oath his prior testimony, and when it is considered that the evidence presented by the petitioner does not undermine the entire structure of the cases upon which the prosecutions were based.

CONCLUSION

The writ of certiorari should be quashed for lack of jurisdiction and, if the merits be considered, the judgment of the Supreme Court of Florida should be affirmed.

RICHARD W. ERVIN
Attorney General

REEVES BOWEN
Assistant Attorney General

COUNSEL FOR RESPONDENT